

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32**

(Lathrop, California)

OLSON PRECAST COMPANY,

and

ONSITE COMPANIES, INC.,

Employers,

Case 32-RC-5200

and

LABORERS INTERNATIONAL UNION  
OF NORTH AMERICA, LOCAL UNION NO.  
73, AFL-CIO

Petitioner.

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, including the parties' arguments made at the hearing<sup>1</sup>, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer Olson Precast Company ("Olson") is engaged in the business of

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<sup>1</sup> Onsite Companies, Inc. did not appear at the hearing. It did provide a brief letter stating its position which was received into evidence by the hearing officer as Board Exhibit 2.

manufacturing and installing precast products at facilities in the state of California and Arizona, including its facility at Lathrop, California. During the previous twelve months, Olson has sold products valued in excess of \$50,000 directly to Sacramento County, California, which is directly engaged in interstate commerce, as well as to other county governments in the state of California. Accordingly, I find that Olson is engaged in commerce within the meaning of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.<sup>2</sup>

4. The Petitioner seeks to represent a unit consisting of all full time and regular part time employees employed at Olson's Lathrop, California facility, including the field installation crew and the temporary employees supplied to Olson by Onsite, Companies, Inc.; excluding all office staff, security guards and supervisors as defined under the Act. A question affecting commerce exists concerning the representation of certain of these employees of the Employers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner contends that certain employees of Onsite Companies, Inc. ("Onsite"),<sup>3</sup> who hold the job classification of "laborer," are jointly employed by Olsen and Onsite and therefore should be included in the Unit. Contrary to the Petitioner, the Employers contend that the Onsite employed laborers should not be included in the Unit.

6. Olson contends that the employees who work in the wall manufacturing division lack a community of interest with the other employees in the petitioned-for unit and should be excluded from the bargaining unit. Contrary to Olson, the Petitioner contends that the wall manufacturing employees share a community of interest with the other employees and should be included in the bargaining unit.

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<sup>2</sup> The Union represents employees for the purpose of collective bargaining and represents employees with regard to the enforcement of the rights secured through collective bargaining. The Union also permits employees to participate in the operation of the Union by, among other things, allowing employees to vote for Union officers and for the ratification of proposed collective-bargaining agreements.

<sup>3</sup> Onsite is an employment agency that supplies temporary employees to Olson.

For the reasons set forth below in the Analysis section, I conclude that Onsite and Olson are joint employers of the temporary employees supplied to Olson by Onsite and that the Onsite employees share a community of interest with the Olson employees. I therefore conclude that the Onsite temporary employees shall be included in the petitioned-for unit. I also conclude that the wall manufacturing employees share a sufficient community of interest with the other production employees at the Olson facility and that the petitioned-for unit, herein called the Unit, is an appropriate unit for the purposes of collective bargaining.

### THE FACTS

Olson is engaged in the manufacture and installation of manhole covers<sup>4</sup> and the manufacture of concrete wall panels. Olson markets and installs its manholes for a variety of customers including Sacramento County and other county governments in the state of California. Olson has a different arrangement for the sale of its wall products. Olson has one customer, a large contractor, who purchases the wall panels from Olson and installs them with its own employees.

Olson has an agreement with Onsite under which Onsite provides temporary employees for Olson. Olson and Onsite also have an agreement that permits Olson to hire Onsite-supplied temporary employees as permanent employees of Olson, once the Onsite employees have worked a minimum of 520 hours as temporary employees. Olson has converted numerous employees to permanent employment with Olson through this arrangement. In fact, Olson has hired all or nearly all of its current permanent employees, including its wall division foreman, after they had first worked at the Olson facility as temporary employees. The Onsite employees working at the Olson facility receive their pay and benefits from Onsite. Onsite is also responsible for workers compensation matters for these employees. When requested by Olson, Onsite managers will counsel or discipline Onsite employees working at the Olson facility.

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<sup>4</sup> The employees in this division also manufacture concrete vaults; however, approximately 95% of the product

Olson's Lathrop, California facility has two divisions, the manhole cover division and the wall panels division. These two manufacturing divisions are located in adjacent buildings, which share a common wall. The top-ranking official at Olson's Lathrop, California facility is Mark Bodhaine, who is a vice president of Olson. Next in command is Jason Moyer, who is the production manager responsible for the manhole cover division.<sup>5</sup>

Olson's manhole cover division opened in November, 2002, and currently employs approximately 12 individuals. The manhole cover division has two subdivisions. One subdivision is engaged in manufacturing, and the other is engaged in installation work in the field. The manufacturing group includes a lead person named Jose Frayle and four laborers, one of whom is an employee of Onsite. The work performed by the manhole production subdivision includes setting up forms, pouring pre-mixed wet concrete into the forms, tying steel rebar, curing, and stripping and patching the finished concrete products, and installing pipes and other miscellaneous items to complete the finished concrete product. One of the Olson employees is a certified forklift driver, and he performs forklift work exclusively. The Onsite employee has less experience and skill than the Olson employees, and therefore he does not set up forms, which requires greater skills.

Frayle reports to Production Manager Jason Moyer, and he appears to also be under the direction of the field crew superintendent, when the superintendent is working at the Olson facility rather than out in the field. Frayle is responsible for overseeing the production of the manhole covers and vaults. He assigns and directs the work of the laborers in his group without direction from others. Although there are different types of work assignments to be performed in this subdivision, and the work requires more skill than is required in the wall division, most of the employees perform the same type of work each day. Frayle does not have the authority to hire or fire employees; however, he does

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produced by these employees are manhole covers.

<sup>5</sup> No party disputes that Bodhaine and Moyer are supervisors. As the record shows that both have the authority to fire employees, assign overtime, etc., I conclude that they are supervisors within the meaning of the Act, and they are

have the authority to recommend such actions. According to Bodhaine, Frayle's recommendations would have some influence, but either Moyer or Bodhaine would investigate the matter on his own. Bodhaine did testify that Frayle has the authority to discipline employees; however, he gave no examples of Frayle exercising that authority. Similarly, Frayle can only assign overtime after he has secured prior approval from his superiors.

The field subdivision includes Jose Aguilar, who is the superintendent of the manhole cover division, and four employees, one of whom is an employee of Onsite. All of the field employees were initially employed in the manhole cover production subdivision. Aguilar, and a laborer who has above average skills work as a team preparing the manholes, installing the manhole covers and fixing cracked or damaged manhole covers. The other three are working on a special project in which they perform various tasks related to the installation of the manhole covers, such as putting "pvc" liners on manhole covers to protect them from corroding gases. Bodhaine testified that this field project is almost complete. If no other work becomes available by the time that project is finished, he will probably layoff the Onsite employee and move the two Olson employees back to the manhole cover production subdivision.

As superintendent, Aguilar is in charge of assigning and directing the work of the field employees. According to Bodhaine, Aguilar has the authority to recommend that employees be disciplined and has the authority to fire employees. Bodhaine also testified that Aguilar had discharged an employee within the last month or so.

Olson's wall division opened in March or April, 2003. The wall panel production employees operate machines, dump concrete into molds, vibrate the finished products, put the products on racks, unload the racks and put the products on pallets in the storage yard.

Until the week prior to the hearing, this division included a foreman, Chuck (last name unknown), a

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excluded from the Unit.

batch operator and nine laborers, three of whom were employees of Onsite. Six employees, including all three of the Onsite employees, were laid off due to Olson's large inventory and the customer's requested delay in future deliveries. Bodhaine testified that he expects to resume production of wall products shortly, and that he intends to recall the Olson employees and to direct Onsite to return the laid-off temporary employees to Olson, if they are still available.

As the foreman, Chuck is responsible for organizing and supervising the production of the wall panels. He does not have the authority to hire employees, but he does give Bodhaine a recommendation regarding whether Olson should hire an Onsite employee who has completed his 520 hour "probation" period.. According to Bodhaine, Chuck does have the authority to fire employees, with "the counsel" of Moyer or Bodhaine. It is not clear whether Bodhaine typically initiates his own investigation when Chuck recommends the discharge of an employee, or whether Bodhaine merely relies on his discussion with Chuck about the incident. Recently, Chuck fired an employee for negligence without first consulting with his superiors; however, in that case the employee had had a history of such errors and Bodhaine had been aware of that ongoing problem. Chuck also has the authority to call the managers of Onsite to have them counsel or discipline an employee; however, the record contains no examples of him having done so. Employee Leo Zambrano testified that on a couple of occasions Chuck had changed the hours of his shift for extended periods of time, and that Zambrano had had no discussions with Onsite managers regarding the various changes in his shift schedule.

The wall division employees generally work a somewhat earlier shift than the manhole cover division employees, although the shifts overlap and the employees in both divisions interact frequently. Although the three groups of employees - manhole, wall, and field - have different schedules, within each group, the Olson and Onsite employees share the same schedule and work side-by-side. All employees use the same time clock; however, the hourly wage rate of the employees varies from \$8 to \$11. The Onsite employees apparently receive \$8.00 to \$9.00 per hour, and the Olson employees

receive \$9.00 to \$11.00 per hour.<sup>6</sup> Apparently, the higher wage rates for Olson employees are given in the manhole cover division.<sup>7</sup> The Olson employees all receive the same medical and dental benefits, and both the Olson and Onsite employees have the same holidays.

The employees of Onsite and Olson are all governed by Olson's work rules and policies. Olson's employees all wear the same type of "Olson" uniform, and the Onsite employees wear their own work clothes rather than a uniform. The two divisions have separate weekly safety meetings. Employees from both production lines use the microwave, table and ice machine located in the manhole cover production area and use the soda machine located in the wall production area. Some supplies used by wall employees are located in the storage area of the manhole production area; when these supplies are needed the foreman or a wall division employee will simply walk over to the manhole area to retrieve them.<sup>8</sup>

In the past six to eight months, an employee who had switched from the wall division over to the manhole cover division has had to return several times for brief periods to perform batch work in the wall division when the regular batch operator did not report to work. Other employees have been transferred to the manhole cover division and then back to the wall division; although most of those employees were subsequently terminated. On two occasions, due to an emergency, two Onsite employees from the wall division assisted employees in the manhole cover division. On at least one occasion, a manhole cover division employee assisted the wall employees in unloading materials.

#### POSITIONS OF THE PARTIES

Petitioner seeks a unit of all full time and regular part time employees employed at Olson's Lathrop, California facility, including the field installation crew and the temporary employees supplied to

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<sup>6</sup> The above listed wage rates are based on the testimony of Bodhaine. Zambrano, the only employee to testify during the hearing, stated that he earned \$9.00 an hour when he was in the wall division and when he was in the manhole cover division.

<sup>7</sup> The record does not disclose the hourly rate paid to the lead person, foreman and superintendent.

<sup>8</sup> In the last few months, wall division employees have not had to get supplies from the storage area in the manhole cover division.

Olson by Onsite, Companies, Inc.; excluding all office staff, security guards and supervisors as defined under the Act. Olson contends that the temporary employees supplied by Onsite lack a community of interest with the permanent employees and seeks to have them excluded from the bargaining unit. Olson also contends that the wall employees lack a community of interest with the manhole cover production employees and field employees and seeks to have the wall division employees excluded as well. Thus, Olson is arguing that the only appropriate unit would consist of the manhole cover production and field employees.

Onsite, through a letter sent to the Region, asserts that it should not be a party to the representation petition because within a few days after the date of this hearing, it would no longer have any employees working at Olson's facility. Onsite further argues that should it resume supplying temporary employees to Olson in the future, these employees would not share a community of interest with Olson's permanent employees.

## ANALYSIS

### TEMPORARY EMPLOYEES

The Board's decision in *M.B. Sturgis*, 331 NLRB 1298 (2000) sets forth the circumstances in which employees employed by a temporary agency and employees employed by a company that has contracted with the temporary agency may appropriately be included in a single collective bargaining unit, over the objections of one or both of the employers. The Board held that if the temporary employees are jointly employed by the temporary agency employer and the user employer, the Board would apply traditional community of interest factors in determining whether a unit consisting of both temporary and permanent employees is appropriate. *Id.*

To establish that two employers are joint employers, "the entities must share or codetermine matters governing essential terms and conditions of employment." *Id.* The evidence in this case



establishes that Olson and Onsite jointly employ the temporary employees. Onsite initially hires the employees and sends the employees to Olson. Onsite governs the pay, benefits and workman's compensation rights of the temporary employees, while Olson determines the hours, job assignments, work rules and other working conditions of the employees. Olson also has the authority to direct Onsite to remove an employee without any prior notice. Thus, as both Onsite and Olson meaningfully affect significant aspects of the employment of the temporary employees, they constitute joint employers within the meaning of Sturgis.

As the evidence establishes that Olson and Onsite are joint employers, it must now be determined whether the two groups of employees share a community of interest. In deciding whether employees share a community of interest, the Board typically considers such factors as the similarity of the employees' skills and functions; the functional integration of the employer's operation; the interchangeability and contact among the employees; the work situs of the respective employees; the employees' general working conditions; the wages and benefits of the employees; and whether the employees share common supervision. The evidence in this case establishes that the Onsite temporary employees share a strong community of interest with the Olson permanent employees such that their inclusion in the Unit is appropriate. The Onsite employees work side-by-side with the Olson employees and work exclusively for the Olson. Onsite employees who successfully complete 520 hours as a temporary employee are typically hired as permanent employees by Olson. The Onsite employees and most of the Olson employees perform similar work and have the same job classification. The employees in each division share common supervision, irrespective of whether they are Olson or Onsite employees. Olson assigns and monitors the work of all the laborers in the same manner. The Onsite and Olson employees in each work grouping work essentially the same hours, receive similar pay and are subject to the same work rules. I conclude that the evidence as a whole establishes that the Onsite temporary employees and the Olson permanent employees share a strong community of interest that

warrants including both groups in the Unit. See *Lodigan, Inc.*, 332 NLRB No. 128 (2000); *Sturgis*, supra; *Interstate Warehousing of Ohio*, 333 NLRB No. 83 (2001).

#### WALL DIVISION EMPLOYEES

The unit the petitioner seeks, a wall-to-wall unit of the employer's Lathrop facility, is presumptively appropriate. *Hegins Corp.*, 255 NLRB 1236 (1981). Olsen seeks to have a unit that excludes the wall division employees. To rebut the presumption that this inclusive production worker unit is appropriate, Olsen must establish that the employees of the wall division do not share a community of interest with the other employees and therefore that the combined unit would not be an appropriate unit.

The evidence, however, establishes that the wall division employees share a strong community of interest with the manhole cover and field employees. The Olson wall division employees and manhole cover employees wear the same uniforms, work at the same location, share the same break area, are governed by the same work rules, and are engaged in similar work. The wall division foreman reports to Bodhaine, the Olson vice president, as does the production manager who is responsible for the manhole cover division. The wall division employees receive the same or almost the same rate of pay that the manhole cover division employees receive, and both groups work similar hours. Within about the last eight months there have been both permanent transfers between the two divisions as well as temporary transfers. Thus, I find that the wall division employees are properly included in the unit.

#### SUPERVISORY EMPLOYEES

The Petitioner took the position at the hearing that the leadperson and superintendent in the manhole cover division, and the foreman in the wall division, are supervisors within the meaning of the Act and that they should be excluded from the bargaining unit. When asked if Olson took the position that these individuals were supervisors, Bodhaine indicated his agreement. Because Onsite did not appear at the hearing, no stipulations on this issue were received. I note, however, that in its letter

opposing the appropriateness of the combined unit, Onsite did not argue that the leadperson, foreman or superintendent are employees.

Section 2(11) of the Act defines a supervisor as one who possesses “authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” The possession of any one of these primary indicia of supervisory authority, as specified in Section 2(11) of the Act, regardless of the frequency of their use, is sufficient to establish supervisory status, provided that such authority is exercised in the employer's interest, and requires independent judgment in a manner that is more than routine or clerical. Harborside Healthcare, Inc., 330 NLRB 1334 (2000); Hydro Conduit Corp., 254 NLRB 433, 437 (1981); Queen Mary, 317 NLRB 1303 (1995). Moreover, the possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., Arlington Masonry Supply, Inc., 339 NLRB No. 99, slip op. at 3 n.10 (2003); Pepsi Cola Co., 327 NLRB 1062, 1063 (1999); Fred Meyer Alaska, Inc., 334 NLRB No. 94, slip op. at 4 n. 8 (2001).

The evidence shows that Chuck, the foreman of the wall division, and Aguilar, the superintendent of the manhole cover division, both have the authority to fire employees. Although it appears that they would normally consult with their superiors before taking such action, the evidence indicates that this consultation is not a requirement, and both Chuck and Aguilar have discharged an employee within the last several months. Chuck, who directs and oversees the work of the wall division employees, also has the responsibility for informing Bodhaine whether an Onsite employee who has completed his/her 520 hours at the facility merits being hired as an Olson employee. I also note that in addition to making Aguilar responsible for the two teams in the field subdivision, Olson also has

leadperson Frayle report to Aguilar rather than to Moyer, when Aguilar is present at the production facility. In light of the evidence as a whole, particularly the evidence that Chuck and Aguilar have the authority to discharge employees, and the fact that no party is contesting the supervisory status of these two individuals, I conclude and that they supervisors within the meaning of the Act and they are excluded from the Unit..

With regard to leadperson Frayle, the evidence shows that he assigns and directs the work of the manhole cover production employees; however, it appears that his assignment and direction of work is routine in nature. Although Frayle has the authority to recommend that an employee be fired, Bodhaine testified that he or Moyer would independently investigate the matter before deciding on the recommendation. Although there is evidence that Frayle may discipline employees, the record does not show whether Frayle has actually disciplined an employee, or whether his disciplinary actions would be made a part of the employees' records, or whether Olson would rely on Frayle's disciplinary actions in deciding on the severity of future disciplinary actions against an employee. Although there is evidence indicating that Frayle may be a Section 2(11) supervisor and even though no party is contesting the status of Frayle, I have concluded that the evidence regarding Frayle's supervisory authority is insufficient to establish that he is a supervisor within the meaning of the Act. I have therefore decided that Frayle will be permitted to vote subject to challenge.

Accordingly, I shall direct an election among the following employees:

**All full time and regular part time employees, including employees who are jointly employed by a temporary agency, employed by the Employer at its facility in Lathrop, California; excluding office employees, guards, and supervisors as defined in the Act.**

There are approximately 21 employees in the voting unit.

#### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO.73, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. *Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote.* Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employers with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before November 21, 2003. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

### RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **November 28, 2003**. The request may **not** be filed by facsimile.

Dated at Oakland California this 14th day of November, 2003.

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